

advance and avoid any new business opportunities in the interim; a drastic result not intended by Congress.

The anti-trafficking rules should also be inapplicable to spinoffs of systems acquired by an MSO as part of a larger transaction. For example, if an MSO acquires another MSO's 50 cable systems, it should be permitted to sell some of the acquired systems within the three year period. Such spin-offs customarily occur where, for example, several of the systems are not located within an area that is compatible with efficient operations of a cable operator's existing systems. There is no indication that the three-year holding rule was intended to proscribe this type of transaction.

F. Implementation of the Anti-Trafficking Rules Should Not Delay the Transfer Process.

The franchising authority should have primary responsibility for monitoring the anti-trafficking rules. The Joint Parties support the Commission's tentative conclusion that local franchising authorities can most efficiently monitor compliance with the anti-trafficking restrictions, thereby assuring that the transfer of a cable system will not unduly be delayed. A certificate filed with a franchising authority should carry with it a presumption that the cable operator is in compliance with the statute or is exempt under one of its provisions.^{19/} As discussed

^{19/} NPRM at ¶ 8.

below, the Joint Parties believe that the Commission's special relief procedures would be an appropriate vehicle by which a franchising authority could test whether such a certificate was bona fide. In order to insure that the statute and the Commission's implementing regulations are interpreted consistently, the Commission should retain jurisdiction over all disputes relating to the anti-trafficking rules.

Operators seeking to transfer ownership of a cable system prior to the expiration of the three-year holding period should only be required to provide the franchising authority with a certificate citing the appropriate provision in the Commission's regulations which supports the exemption.

II. The Commission Should Entertain Waiver Applications When Necessary to Serve the Public Interest.

The Joint Parties believe that the Commission has broad, unqualified, waiver powers under Section 617(d), not limited to cases of default, foreclosure or other financial distress. As the statute says, "[t]he Commission may, consistent with the public interest, waive the requirement of subsection (a). . . ." The only limitation on the Commission's waiver authority is that, if franchise authority approval is required by the franchise agreement, the Commission cannot waive the three-year restriction

unless the franchise authority has approved the transfer.^{20/} In addition to its general waiver authority, the Commission also has the power to "use its authority . . . to permit appropriate transfers in the cases of default, foreclosure, or other financial distress."

Section 617(d)'s references to "public interest" determinations and "appropriate" transfers indicate Congress' willingness to let its expert agency act pursuant to general waiver powers. In contrast, the references to "default, foreclosure, or other financial distress" merely indicate circumstances in which Congress has pre-determined that waivers are always consistent with the public interest. Congress would only have granted the Commission specific, rather than a general waiver power, had it intended to limit the right to grant a waiver to cases of default, foreclosure, or financial distress.

The Joint Parties submit that the Commission should consider waivers of the three-year holding rule on a case-by-case basis. There are, however, certain situations in which a waiver would clearly be in the public interest.

The Commission should be particularly receptive to waivers involving the acquisition of contiguous systems. Such an acquisition would enable an operator to achieve economies of scale which would lead to enhanced service for both sets of subscribers. The public interest would also

^{20/} Section 617(d).

clearly be served when a buyer is willing to invest quickly and significantly to improve cable services when such investment does not involve unreasonably raising rates. Section 617 should not be used to discourage investors willing to make substantial improvements to a system without imposing unreasonable rate increases on subscribers.^{21/}

The specific exception for "any sale required by law" in Section 617(c)(1) exempts from the holding period those transfers into bankruptcy or receivership which are covered generally by Section 73.3541 of the Commission's broadcast rules on involuntary pro forma assignments and transfers. Under the broadcast rules and policies, however, a sale from a receiver or trustee to a third party for the benefit of creditors, or the acquisition for sale or subsequent sale to a third party by the creditor itself, constitutes a "substantial" change in control that normally requires a "long form" application. There is no reason at all, however, to subject these transactions to the holding period in Section 617. Sales out of bankruptcy or receivership and sales to, by or for the benefit of creditors present no prospect of "profiteering." Moving a cable system out of the hands of trustees or creditors, who would likely have no system operation experience, and into the hands of a normal

^{21/} Exercise of the Commission's waiver authority should also take into consideration the fact that unreasonable rate increases, if they do occur, can be eliminated pursuant to Section 623 of the 1992 Cable Act.

operator should only benefit subscribers. Unless creditors are certain that they will be able to divest themselves of cable properties acquired pursuant to foreclosure or similar legal process, they will be reluctant to lend funds to the cable industry.

While other waiver decisions regarding financial distress should be made on a case-by-case basis, the unavailability of capital sufficient to maintain an adequate level of cable television service should be a good cause for waiver,^{22/} if accompanied by the demonstrated ability of the transferee to invest in the cable plant. Similarly, the sale of a system at a loss should qualify as a transaction permitted within the three-year holding period. By definition the sale of such a system would not trigger "profiteering" or higher rates or poorer service as a result of the sale. In addition, a waiver applicant who demonstrates that the transfer of a system will not lead to increased prices or a diminution in service warrants a waiver grant. Moreover, the approval of a franchising authority should be presumptive evidence that this waiver condition has been satisfied.^{23/}

22/ NPRM at ¶ 19.

23/ Congress specifically exempted from the holding period "any sale required by . . . any act of . . . any franchising authority," acknowledging implicitly that the purpose of the holding period is not to tie the hands of local franchising authorities. Franchising authorities are likely to be in the best position to assess whether a "substantial" change of
(continued...)

The Joint Parties also support the concept of a "contingent" waiver, issued by the Commission, which would be conditional on securing the franchising authority's approval of the transfer, when required. A cable operator should have the discretion to first submit a waiver petition to the franchising authority and then to the Commission, vice versa, or, where appropriate, to the franchising authority and the Commission simultaneously. If the Commission approves the petition before the franchising authority, it may grant it on a contingent basis.

III. The Commission Should Establish Procedures
to Enforce the Anti-trafficking Rules
Consistently and Equitably

A. Complaint Resolution Procedures Should
Provide for Consistency and Expediency.

The Commission should establish specific procedures for resolving disputes involving the application of the anti-trafficking rules. As Section 617 of the Cable Act will require consistency of interpretation, disputes regarding the three-year holding period would best be resolved by the Commission directly.

The Joint Parties support the adoption of the Commission's special relief procedures to resolve

23/ (...continued)
control sought within the three-year holding period would have any adverse impact on cable rates or services. Thus, where a franchising authority supports a proposed "substantial" change of control within the three-year holding period, the Commission should be provided with a strong presumption in favor of a grant of the waiver.

anti-trafficking disputes.^{24/} The Commission should resolve disputes by expedited "paper" pleadings in order to avoid prolonged litigation that could delay, and possibly disrupt the proposed transfer of a franchise.

B. Sanctions Should Not Harshly Punish
Good Faith Interpretations of the
Anti-trafficking Rules.

In the absence of statutorily imposed penalties, the Commission should devise sanctions that serve as a realistic deterrent to conduct that violates Section 617, but that do not punish actions resulting from good faith interpretations of the statute or the Commission's rules. The Commission notes that it has authority under Section 503 of the Communications Act to impose forfeitures for violations of the anti-trafficking rules.^{25/}

The Joint Parties support the Commission's conclusion that a mistake involving a good faith interpretation of the statute or the Commission's anti-trafficking rules should not result in an "unwinding" of the flawed transaction. In the absence of a willful violation, this remedy would constitute a draconian solution and would penalize the good faith actions of the buyer of the system. Situations will also arise where either the buyer or the seller will not be able to make the other party "whole" after the unwinding of

^{24/} 47 C.F.R. § 76.7 (1992).

^{25/} NPRM at ¶ 13.

the acquisition, again a draconian penalty if the short-changed party was not at fault. The Joint Parties encourage the Commission, therefore, to reserve the "unwinding" penalty for especially egregious violations of Section 617, and only apply it (i) where there is improper conduct on both sides of a transaction, and (ii) where a franchising authority can demonstrate that, absent an unwinding of the transaction, the public interest would be disserved.

C. The Three-year Holding Period
 Should Be Calculated With Reference
 to a Date Certain, When Possible.

The Commission's rules should provide a clear, easy method for determining start dates for the three-year holding period. For new systems, the date of franchise award is the most appropriate "date certain" for calculating the three-year period. In contrast, using the date of "activation" might be unnecessarily complicated. As many cable systems gradually expand their service within a franchise area, waiting until a system is "fully" activated might result in an inordinately long holding period.

For existing franchises, the three-year period should run from the date the application for the previous transfer of the franchise was filed with the local franchising authority, if such application was required. If an application was not required, the effective date of the

acquisition agreement should mark the beginning of the three-year holding period.

IV. The Commission Should Establish Reasonable Information Requirements for Proposed Transfers.

The Commission should establish reasonable minimum informational requirements for the transfer of a franchise. These should include the legal, technical, and financial qualifications of the applicant to purchase the system. The Commission's regulations should prevent franchising authorities from requesting information which is irrelevant to an operator's ability to operate the system to be acquired, and which is designed to lead to delay. Requests that are not germane to the transaction should not be permitted.^{26/}

It would be appropriate for a franchising authority to ascertain the nature of a buyer's experience to operate a system. This would include whether a franchise renewal had ever been denied or a franchise revoked, and the operator's technical qualifications. However, information regarding an operator's other affiliated companies, whether cable-related or not, should not be the subject of inquiry. For example, a franchising authority should not be permitted to request

^{26/} An operator commonly faces demands from a franchising authority that have no relevance to the issue of its qualifications and competency to operate a system or hold a franchise. The Commission's regulations should discourage attempts to use the transfer process as a vehicle to obtain concessions from an applicant as a condition of granting a franchise transfer.

information regarding an operator's franchise obligations for other systems in which it has an interest.

The submission of letters of reference demonstrating that a buyer is financially capable of acquiring and operating a system, or, alternately, the buyer's financial statement, should be sufficient to establish its financial qualifications with a franchising authority. The Commission should preclude a franchising authority from requesting information from an applicant which is not necessary to establish its financial qualifications.

The 120-day period in which a franchising authority must act upon any request for approval of a sale or transfer of a franchise pursuant to Section 617(e) should not be unduly delayed by frivolous information requests. A franchising authority's request for information should be limited to whether an applicant is qualified to operate the system and whether it has the ability to comply with the requirements of the existing franchise. An initial request for information should be complete, and a franchising authority should not be permitted to toll the 120-day period by making requests for additional information. Only the information which an operator fails to supply and which is material to rendering a decision on the transfer should stay the running of the 120-day approval period.

A time frame must be established within which a franchising authority must advise an operator as to the

information that must be submitted to trigger its review of the application. Otherwise, a franchising authority could interminably delay the running of the 120-day period. The Joint Parties believe that a franchising authority should be required to provide an operator with the information necessary for it to act on a transfer request within ten (10) days after the operator provides the franchising authority with notification that it intends to sell the system.

V. Cable Operators That Purchase and Integrate SMATV Systems Should Be Exempt from the Cross-ownership Provisions of Section 613.

The Commission should permit a cable operator to purchase a satellite master antenna television service ("SMATV") with the intention of connecting it to its cable system. Section 613(a)(2) provides that "[i]t shall be unlawful for a cable operator to . . . offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system." Read literally, this section might prevent these acquisitions because, for a short transitional period, a

cable operator would be "offering" SMATV service within its franchise area to a "stand alone" SMATV system.^{27/}

A cable operator should have six (6) months to connect the SMATV operation to its existing system. An operator that was not able to meet this time frame should be permitted to file a petition for special relief. Absent this clarification, cable operators will be forced to temporarily suspend service to subscribers between the dates of the acquisition of a SMATV operation and its connection to the cable system.

VI. Subscriber Limits Should Be Implemented on a National, Rather than a Regional or Local Basis.

The Commission must develop subscriber limits under Section 613 on a national, rather than a regional basis. Congress prescribed such limits as a means of limiting the ability of large MSOs to engage in anticompetitive acts vis-a-vis program suppliers and extract financial interests from such programmers as a condition of carriage. Section 616 of the Cable Act explicitly forbids a cable operator from requiring a financial interest (or exclusivity) from a programming vendor as a condition for carriage. That issue having already been considered, the Commission should implement Section 613 to address Congress' other concern:

^{27/} Section 613(a)(2) was not intended to prevent cable operators from providing service to apartment complexes, condominiums, and similar dwellings that were integrated with the cable system.

that large MSOs will have sufficient marketplace power to "discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction."^{28/}

The Joint Parties submit that in this context only a national subscriber limit makes sense. Local or even regionally concentrated cable operators do not have the monopoly or monopsony power to dominate the programming market, which in reality is a national market. The language in the Senate Report makes clear what Congress had in mind: "[I]f one MSO owned all the cable systems in the United States, it would have tremendous power vis-a-vis producers of programming. Even with fewer ownership interests, the MSO could still have significant market power."^{29/} It would be a significant stretch to interpret "fewer ownership interests" as including regionally (or locally) concentrated cable operators. Few regional cable operators will have the market power to determine what programming services can "make it on cable."^{30/}

^{28/} House Report at 43.

^{29/} S. Rep. No. 102-92, 102d Cong. 1st Sess. 33 (1991) (emphasis added).

^{30/} Congress' other concern, that MSOs will extract equity interests from programming services, is also unrealistic at the local or regional level. Regionally or locally concentrated MSOs are unlikely to "buy their way onto cable" by coercing an equity interest from a programming service.

Moreover, Section 613(f) requires the Commission's subscriber limits to take into account "any efficiencies and other benefits that might be gained through increased ownership and control" when determining such limits.^{31/} For example, cable operators that acquire either contiguous or nearby systems benefit from increased economics of scale in terms of purchasing power and administrative consolidation. Ultimately, cable subscribers of both systems benefit. Physical interconnects of nearby systems can provide the foundation for technological advances that would otherwise be infeasible. The creation of local or regional "hubs" can also provide the threshold densities necessary to permit extensions of cable service into nearby rural locales. Otherwise, the benefits and efficiencies of concentration would be limited to national MSOs.^{32/} The Commission, therefore, should make it clear that any attempts to set or enforce regional concentrations standards will be preempted

^{31/} Section 613(f)(2)(D).

^{32/} To the extent that local or state governments, franchising authorities (or even the Commission) have concerns over horizontal concentration, the Cable Act already allows a franchising authority to exert significant control over a cable operator's activities through the regulation of rates and customer service standards.

by the Commission's rules under Section 613(f).^{33/} The Joint Parties also note that Section 613's legislative history indicates that any subscriber limits imposed should not force a divestiture of cable systems.^{34/}

Finally, the Joint Parties agree with the Commission that reporting requirements are unwarranted in connection with the proposed subscriber limits. As the Commission notes, subscriber information is widely available.^{35/} The Commission should rely on the complaint process rather than imposing burdensome and unnecessary reporting or certification requirements on operators.

VII. Channel Occupancy Limits Must Not Discourage MSO Investment in New Programming Services.

Cable operator investments in programming services have often been critical to their very survival, especially the innovative television genres of the 1980s (including C-SPAN, CNN, The Discovery Channel and MTV). The success of those services is attributable to their quality and appeal and the investment risks assumed by the industry. Many of

33/ Local attempts to set or enforce horizontal concentration standards might easily prevent an otherwise permissible sale of cable systems concentrated in a particular locality. For example, the transfer of an MSO that includes scores of franchises could be delayed or stymied by a single franchising authority. Objecting to the ownership by an MSO of multiple systems within a jurisdiction.

34/ Senate Report at 34.

35/ NPRM at ¶ 39.

the most successful cable services, like ESPN and USA Network, were able to attract investment capital on their own; others, like Discovery and CNN, could not. Unless the Commission is fully satisfied that all future programming innovations will have little difficulty attracting capital, continued cable investments should not be unduly discouraged.

If MSOs cannot reasonably provide subscribers with programming services in which they have invested, their incentive to promote new ideas will be impaired significantly, with an accompanying loss in programming diversity. By their very nature the channel occupancy provisions of Section 613 pose critical questions regarding their constitutionality. The Commission's rules should attempt to minimize this infirmity.

A. The Channel Occupancy Rules Should Only Limit the Carriage of Vertically Integrated Services in Which the Affected Cable Operator Has an Attributable Interest.

The Commission must clearly establish that the channel occupancy limitations of Section 613 only restrict a cable operator's ability to carry programming services in which the operator has an attributable interest. Broadening the prohibition to include any vertically integrated programming service would severely restrict the delivery of diverse programming to subscribers without addressing Congress'

concern that cable operators unfairly favor their own programming services.

In addition, broad limitations on carriage would significantly impede the flow of investment capital from MSOs into new programming services. If, for example, there could be no more than eleven vertically integrated services (regardless of ownership) on the average cable system, the risk of investing in the twelfth service would be prohibitively high. Subscribers clearly benefit from cable's ability to offer that twelfth, thirteenth or fourteenth service.

As the Commission notes, both the language of Section 613 and its legislative history are unclear regarding the appropriate formula for limiting the number of vertically integrated services on a cable system.^{36/} What is clear, however, is that there is no possible set of circumstances which could reasonably justify counting programming services affiliated with other cable operators towards a cable system's channel occupancy limits. Carriage of such

^{36/} NPRM at ¶ 49. For example, the Senate Report suggests that a cable system could be required to limit each vertically integrated MSO to a specific number of channels, regardless of whether there was a connection between the service and the owner of the particular system. Senate Report at 80. In contrast, Section 613 specifically directs the Commission to implement rules to ensure that "cable operators affiliated with video programers do not favor such programmers in determining carriage on their cable systems[. . . .]" (emphasis added).

services is purely a business decision driven by perceived consumer demand.

The Commission's conclusion that only programming services affiliated with a particular cable operator should be subject to the channel occupancy limits on that operator's systems is both reasonable and rational. As the Commission states: "We note that such an interpretation would be consistent with Congress' objectives of increasing diversity and expanding the number of voices available to consumers."^{37/}

B. The Proposed Attribution Rule Does Not Reflect a Realistic Incentive Level Under Which a Cable Operator Would Favor an Affiliated Programming Vendor.

MSO investment in new or struggling programming services has created the greatest diversity of programming in television's history.^{38/} Rules that limit an MSO's incentive to invest in such services -- for example, by denying its systems the ability to carry a new service -- can only lead to fewer programming services.

As an initial matter, the Commission should establish that when a cable operator, through arm's-length negotiations, acquires an interest and functions essentially as a typical investor in a programming service -- that is,

^{37/} NPRM at ¶ 50.

^{38/} For example, CNN, the Discovery Channel and BET are examples of programming networks that have been successfully rescued by MSO investment.

without management control -- there is no "attributable interest" for purposes of Section 613. The Joint Parties further submit that the proposed 5% ownership interest broadcast standard is not meaningful in the Section 613 context. The 5% broadcast standard guarantees editorial diversity in a market that may have relatively few broadcast outlets. In marked contrast, the proposed cable operator/programmer attributable interest standard will merely identify actors that may have the incentive to act anti-competitively.^{39/} The Joint Parties propose that the Commission adopt an attributable interest standard of 25% as a means of identifying those MSOs with an incentive to favor affiliated programming services.^{40/}

39/ Moreover, it is highly unlikely that an MSO will sacrifice its own subscriber penetration for the sake of a five percent ownership interest in a programming service by favoring affiliated --but unpopular -- programming over non-affiliated programmers.

40/ The Commission has recently proposed raising the broadcast attribution standards to 10% for individual investors and 20% for institutional investors. See Notice of Proposed Rulemaking, MM Docket No. 92-51, 7 FCC Rcd 2654, 2655 (1992). Whichever cable attribution standard the Commission adopts under Section 613, there are no circumstances which would justify a cable standard lower than the broadcast standard. Any increase in the broadcast standard should automatically trigger a reevaluation of the cable standard, if it is lower or equal to the broadcast standard.

C. The Commission's Rules Must Encourage the Maximum Number of Voices Without Limiting Incentives to Invest in a Programming Service.

Congress has explicitly forbidden the Commission from "impos[ing] limitations which would impair the development of diverse and high quality programming."^{41/} The Joint Parties propose four ways in which the Commission may fulfill that directive.

First, the Joint Parties endorse the Commission's tentative conclusion that, whatever formula it adopts, a system's full number of activated channels should form the basis for determining that system's occupancy limit.^{42/} Eliminating arbitrary categories of programming from the calculation will not fulfill Congress' objective of increasing program diversity.

Second, the Joint Parties urge the Commission to provide a "start-up" grace period of, for example, three years during which new services would not be counted towards a cable system's channel occupancy limits. This period would allow MSOs to invest in new services without having to discontinue carriage of proven and established services.

^{41/} Section 613(f)(2)(G).

^{42/} NPRM at ¶ 48. The Commission correctly questions the appropriateness of subtracting over-the-air broadcast channels, public, educational and governmental ("PEG") access channels and leased access channels from the total number of activated channels on a system when determining channel occupancy limits. Carriage of these channels is often mandated, and each provides a significant viewing alternative to cable programming services.

This is particularly important as so many new services begin their "roll-out" on parent MSO systems. At the end of three years, the MSO would have to determine whether the new service merited continued carriage on the its systems, perhaps in place of another affiliated service, or deletion. Without this grace period, MSO investment would be seriously inhibited by an unwillingness to risk established services.

Third, the Joint Parties endorse the Commission's proposal to establish a threshold beyond which channel occupancy limits would no longer be applicable.^{43/} As channel occupancy grows, any potentially anticompetitive effect resulting from the favoring of affiliated programmers must necessarily diminish.^{44/} The Joint Parties propose, therefore, that any system with more than 54 channels only be subject to occupancy restrictions for 54 of those channels. Any such system would be able to devote additional channels to affiliated programmers.

Finally, the Joint Parties support the elimination of channel occupancy limits in areas where effective competition has developed.^{45/} In the face of such competition, cable operators would have little incentive to

^{43/} NPRM at ¶ 54.

^{44/} Obviously, any multiplexed service delivered via "compression" technology on a single channel should not count as more than one service for channel occupancy limit purposes.

^{45/} NPRM at ¶ 54).

make programming decisions on any basis other than marketplace factors.

D. The Commission Must Establish that Cable Operators Cannot Be Liable Under Two Sections of the Cable Act for the Same Conduct.

Two sections of the Cable Act simultaneously require the Commission to implement regulations to prevent cable operators from treating affiliated programming vendors differently than non-affiliated vendors. Section 613 requires rules that "ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems. . . ." At the same time, Section 616 prevents a cable operator from:

unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors[.]

Notwithstanding the fact that Section 613 prohibits the favoring of affiliated vendors and Section 616 prohibits the disfavoring of non-affiliated vendors, cable operators should not be forced to interpret two sets of rules that essentially prohibit the same conduct. The Joint Parties encourage the Commission to harmonize Sections 613 and 616 into one set of rules. Because Section 616 provides greater specificity as to prohibited conduct, rules promulgated thereunder will give greater guidance to vertically integrated cable operators. In addition, Section 616's

requirement of anticompetitive effect ("unreasonably restraining the ability . . . to compete fairly") must remain an important component of the Commission's harmonized rules.

E. Channel Occupancy Limits Should Only Be Enforced Through the Complaint Process.

The Joint Parties respectfully suggest that the Commission's proposal to institute an annual certification process regarding channel occupancy limits is unnecessary and unworkable. The Cable Act's existing provisions regarding program access,^{46/} combined with a realistic channel occupancy limit should obviate the need for an annual certification process which will prove unnecessary for the vast majority of cable operators and unhelpful for the vast majority of franchising authorities. The complaint process should be more than adequate to deal with the few cases that might arise each year.

^{46/} Section 616 and Section 628 of the Cable Act.

CONCLUSION

For all of the foregoing reasons, the Commission should adopt rules and policies in accordance with the proposals contained in these comments.

Respectfully submitted,

By: 

Brenda Fox
Peter H. Feinberg
Michael Pierce
DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Its Attorneys